Schuldoverneming

Verhoeven, Jacobus Jan

Conclusion

There has existed since ancient times the need, particularly in the area of commercial traffic, to be able to transfer a commitment to pay a debt to a third party. A singular succession of a debt, whilst maintaining the obligation, whereby the liability is transferred to a succeeding debtor, was not considered possible under Justinian Law (Codex Justinianus) and in the Ius Commune. In these legal systems the obligation was considered to be a personal engagement between creditor and debtor, and a succeeding debtor could only bind himself on the basis of an independent obligation to the creditor.

According to Justinian Law, the creation of an obligation for the succeeding debtor instead of the original debtor could be achieved if the succeeding debtor in a legal proceeding acted as *procurator in rem suam* for the original debtor. If the succeeding debtor in this procedure would enter into *litis contestatio* with the creditor, then, from that point on, the original debtor would be freed from his obligation, and any judgement would be issued against the succeeding debtor. Because the succeeding debtor had accepted the liability in his own interest (*in rem suam*), he could not recover from the debtor in the event of any required payment to the creditor. Although a debtor could only be freed from his obligation to a creditor, if that creditor and a succeeding debtor entered into *litis contestatio*; C. 2,3,2 shows that the debtor could plead a defense against the creditor if the latter had implied his agreement to the transfer of debt by bringing legal action against the succeeding debtor.

In the second place, under Justinian Law, a succeeding debtor could be legally bound instead of the original debtor by novation. The original obligation would be discharged through novation, which meant that all accessory rights and defenses would also be cancelled. If parties wanted to call on these accessory rights and defenses after novation, then it would be necessary that they be re-established. Only in the event of already established rights of pledge and mortgage would it be possible to maintain such rights, with retention of rank, for the new obligation.

Lastly, under Justinian Law, it was possible to use delegation to transfer a commitment to pay a debt to a third party. In this case the debtor, i.e. the delegator, ordered the succeeding debtor, i.e. the declared debtor or delegated party, to undertake to the creditor, i.e. the delegatee, in the delegator/debtor's place, to satisfy the debt. The succeeding debtor could create an undertaking to the creditor by entering either into a *stipulatio* or a *litis contestatio*. This stipulation entered into on the basis of delegation did

not necessarily have to be on the basis of novation. The stipulation only served as novation if this appeared from the parties' intentions. The original debtor was freed from any obligation to the creditor, even if the stipulation did not serve as novation, because the transfer of a liability by delegation was considered payment in full by the delegator/debtor to the creditor/ delegatee.

Because the succeeding debtor in the case of a *litis contestatio*, or novation, or delegation, had an undertaking to the creditor on the grounds of a new obligation, this meant that in none of these cases there was question of a singular succession of debt.

Following Justinian Law, it was also assumed in Mediaeval Law, ancient French Law, and Roman-Dutch Law that a succeeding debtor could only create an undertaking, instead of the original debtor, by entering either into a *litis contestatio*, or novation, or delegation.

Litis contestatio was described on the basis of the glossaries as necessitating a renewal of a debt obligation. However, novation entered freely into by the parties was considered a voluntary renewal of the debt obligation. An important distinction in legal effect was that all accessory rights and defenses were cancelled in the event of voluntary novation, while they continued to exist in the event of a renewal of the debt obligation being necessitated, i.e. in the case of *litis contestatio*. If a succeeding debtor entered into a *litis contestatio* with the creditor, then this was not considered a necessary, but a voluntary method of novation, on the basis of the glossaries. This consequently meant that in this case accessory rights and defenses also were cancelled.

Novation of a liability could be created by an agreement between creditor and succeeding debtor (expromission) or by way of a tripartite agreement, including the original debtor.

Although changes in the area of novation and *litis contestatio* in the Ius Commune, when compared to Justinian Law were not significant, the application of delegation did undergo far-reaching changes.
On the basis of the glossaries, delegation was viewed as a particular method of novation. Delegation was always considered to be coupled with novation.
Since Donellus it had been the general view that delegation could only be used to replace the debtor in an obligation, and not the creditor. This restricted the application of delegation to the transfer of debts.

The position on delegation did not undergo any change in ancient French Law and Roman-Dutch Law until the introduction of the *Code Civil* and the OBW, respectively.

Entering into novation or delegation would cancel the original obligation, thus freeing the debtor. The risk that the succeeding debtor would not pay would lie with the creditor. Because creditors would often not wish to assume this result, in practice it was usually considered sufficient if the original debtor ordered the succeeding debtor to pay the creditor on behalf of the original debtor. In such case the succeeding debtor did not enter into a renewal of the debt obligation. This legal concept was given existence in Roman-Dutch Law next to delegation and was referred to as *'assignatio'* or 'aenwijzing' (assignment). Roman-Dutch Law agreed that the creditor could accept the assignment, giving him the right to seek repayment directly from the succeeding debtor. The practice of having the creditor accept the assignment can be considered as a particular application of a stipulation on behalf of a third party; a concept that was also gradually accepted under Roman-Dutch Law.

Ancient French Law did recognize the assignment, but not the possibility for a creditor to acquire any rights from the assignment with respect to a succeeding debtor. In the event it was the parties' intention to create such rights with respect to the succeeding debtor, in addition to the original debtor, for the creditor, then a tripartite agreement was called for. This agreement was substantially similar to delegation, albeit without the effect of novation. This type of agreement creating an undertaking of the succeeding debtor, in addition to those of the original debtor, was referred to as a 'délégation imparfait'.

The *Code Civil* and the OBW did not contemplate the possibility of singular succession of a debt. The usual manner of creating singular succession of a debt under the OBW was by way of novation of a liability. Both expromission and delegation were provided for in the OBW.

Dutch case law in force under the OBW, in making a determination of the legal effect of agreements intended to transfer a liability, would look at the administration of novation and delegation under the law. However, in those cases were it had clearly been the intention of the parties that existing accessory rights or defenses were to remain in force, as in the case of a transfer of a mortgage, then the agreement could not be considered a novation. The Supreme Court of the Netherlands handed down a decision (HR 17 February 1843, W 410) shortly after adoption of the OBW, stating

that, in order to determine the legal effect of an agreement entered into to transfer a liability between debtor and declared debtor, a connection could be drawn to the regulations covering stipulation on behalf of a third party, as provided for in article 1353 OBW. Although the Supreme Court made no reference to that effect, this decision in fact continued the practice dating from Roman-Dutch Law with respect to the possibility of assuming the *assignatio*.

Nevertheless, neither novation nor a stipulation on behalf of a third party would in all cases meet with the requirements of everyday life. For example, agreements intended to transfer a payment commitment, such as would be the case with the transfer of a sole proprietorship, in many cases were intended to create an undertaking from the succeeding debtor to replace the original debtor for the creditor with respect to the same obligation.

Gradually literature and case law accepted the concept that such a replacement of the original debtor in an obligation should be possible. This development stemmed from the German science of law

During the second half of the 19th Century the Pandektists were able to let go of the centuries' old idea that an obligation was inseparable from the actual person of the debtor. This development had been given force by Delbrück, who was of the opinion that an obligation was not so much determined by the personal relationship between debtor and creditor, but more determined by the claim and debt that arises from it as an independent asset. Even though his view of the obligation was not adopted, Delbrück's studies did create the impetus for a changed view of obligations. In responding to Delbrück's study that same year, it was the opinion of Windscheid that the obligation creates a relationship between two people aimed at a certain performance to be undertaken by the debtor. This performance usually can also be undertaken by another party without the performance being changed in any meaningful way. According to Windscheid, in all these cases the debtor of the obligation can be replaced without this act changing the obligation. It is the view of Windscheid therefore that the obligation is determined by its performance, and this was the ruling view in the German science of law since the end of the 19th Century. Windscheid's conclusion, that a debtor can be replaced by a third party without canceling the obligation, was generally accepted. This development allowed for the transfer of a liability, in the meaning of singular succession of a debt, to be recognized in the German science of law before the end of the 19th Century. It was recognized that replacing the

debtor might have an influence on the ability to collect on the claim. For this reason a change of debtor can not take place without the cooperation of the creditor. This issue provoked the question in German science of law, whether a creditor shall be a party to the transfer of the liability, or whether it suffices for him to consent to the transfer (the decision theory). Following custom as it existed in practice, most legal authors deemed that cooperation of the creditor could be limited to providing his consent to an agreement between original debtor and declared debtor.

German Law concurred with this view in § 415 BGB. The agreement to transfer the liability, according to § 415 BGB, can be entered into by original debtor and declared debtor and becomes effective if the creditor provides his consent. By providing this consent, the creditor does not become a party to the agreement, according to German law. Separately, § 414 BGB provides that a transfer of a liability can also be effected by an agreement between the creditor and the declared debtor. In practice this type of agreement is less important.

Although the Dutch science of law followed its German counterpart in paying attention to the doctrine of liability transfer, there was no true debate on the question whether a transfer of a liability could be adopted within the framework of the OBW. At the time when Meijers commenced designing a new Civil Code, there existed no consensus on this issue. While referring to the need evidenced by actual practice, Meijers incorporated a transfer of a liability in the draft of the new Civil Code. In drafting the provisions he was influenced by German law. Novation was omitted from the new Civil Code, because, according to Meijers, there no longer was a need for it.

In fact, the regulations for a transfer of a liability differ from novation on two fundamental issues, allowing the regulations to better accord to the needs of daily practice. Firstly, the parties, when agreeing that the declared debtor will discharge the debt instead of the debtor, usually only intend to replace the debtor, without canceling the obligation including all related rights and defenses. This result can be achieved by transfer of a liability, but not with novation. Secondly, article 6:155 of the Dutch Civil Code has been drafted to provide that a transfer of a liability is effected by an agreement between debtor and declared debtor, without the creditor becoming a party to the agreement. But in the case of novation, the creditor has to, and had to, be a party to the agreement. It is usual practice, however, that an agreement for the transfer of a liability is made between debtor and his successor, while it suffices for the creditor to provide his consent to the

agreement. The regulations covering the transfer of a liability for this reason accords better with reality in practice than the regulations for novation.

The agreement to transfer a liability is an obligatory arrangement between debtor and declared debtor. The actual transfer of the liability only takes place when the creditor, after being notified, has consented to the agreement. The function of the creditor's consent is comparable to the notice of assignment to the assigned debtor upon transfer of a claim. It is my opinion that, for this reason, it can be stated that the creditor, while not a party to the obligatory agreement, does become a party to the delivery act that causes the debt to actually transfer to the assets of the declared debtor.

Although not provided for in the Civil Code, and although Meijers in fact expressly excluded this as a possibility, it is my opinion that the transfer of a liability can also be effected by an agreement between creditor and declared debtor. This ties into the possibility, expressly permitted in the OBW, of effecting novation of a liability by way of expromission and with the possibility, also recognized by the Civil Code, of having a third party discharge a debt. In an agreement between creditor and declared debtor the obligatory agreement and the delivery act coincide. The liability transfers to the declared debtor at the time the agreement becomes effective, i.e. when executed.

Article 6:155 through 6:158 of the Dutch Civil Code has not copied the German regulations verbatim, but nevertheless both sets of regulations are in effect largely similar.

An important difference between the regulations is that in German law consent of the creditor is given retroactive force, whilst this retroactive force is expressly denied in Dutch law. To achieve that the parties are not dependent on consent from the creditor to determine the moment when the liability transfers, Dutch law has determined that debt, as it pertains to the relationship between debtor and declared debtor, transfers simultaneously with the agreement for the transfer of the liability being executed. From the point of view of Dutch Law, the consequences of the transfer have therefore been made relative; as between declared debtor and original debtor, the moment in time the liability transfers is different from that at which it transfers in the relationship between declared debtor and creditor. Creating such a relative transfer of a liability however denies the nature of the obligation and is therefore impossible. That is the reason why transfer of a liability, as between debtor and declared debtor, occurs only when the

creditor has consented. The debt is transferred in its then existing capacity as it results from the obligation between debtor and creditor at the moment of transfer.

Both German and Dutch Law apply the rule that transfer of a debt is dependent upon the validity of the agreement governing the transfer of the liability. This means that if such agreement is invalid, then the debt has not transferred to the declared debtor. The declared debtor can raise the defense against the creditor that the debt, because the agreement transferring the liability is invalid, did not transfer to him. Because the agreement to transfer the debt can be viewed as title of transfer, this means that a transfer of a liability, contrary to the law's intention, in fact constitutes a causal legal act. Intrinsically, a transfer of a liability in this regard does not differ substantially in its effect from novation. In the case of novation an invalid agreement to transfer a liability will create a bar to establishing a new obligation for the succeeding debtor. A creditor can be prejudiced by an invalid agreement to transfer a liability, because, for example, he has neglected to take legal action against the debtor. Both German and Dutch Law contain no specific provisions to protect the position of the creditor. It is my opinion that a creditor, who has, in good faith, relied on the validity of a transfer of a liability, can lodge an appeal on the basis of article 3:36 of the Dutch Civil Code. This means that an invalid transfer cannot be raised as a defense, and that he can hold the declared debtor responsible for payment of the debt.

Deficiencies in the underlying legal relationship between debtor and declared debtor do not however affect the validity of the transfer of the liability. This also accords with the general principles of Dutch property laws, providing that the motivation to enter into a legal proceeding does not affect its validity. In this regard, regulations governing the transfer of liabilities do not only accord with those of German Law, but also accord with what was the rule with respect to delegation under Justinian Law and with respect to novation as governed by the OBW.